IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KELLY ESCHBACH and ERIC ESCHBACH, wife and husband, and the marital community comprised thereof,	)	No. 63274-4-I
	)	DIVISION ONE
Respondents,	)	UNPUBLISHED OPINION
v.	)	
AMY GRIMM and JOHN DOE GRIMM, wife and husband, and the marital community comprised thereof,	)	
	)	FILED: March 22, 2010
Appellants.	)	

Grosse, J. — An affidavit that explains previous testimony is not necessarily a contradiction of that testimony. When deposed after a mandatory arbitration award in plaintiff's favor, the defendant denied authorizing her attorney to pursue a trial de novo. In a later affidavit, the defendant averred that she had authorized her attorney to pursue a trial de novo, and explained her earlier answer. The trial court erroneously struck the defendant's request for a trial de novo.

FACTS

The underlying action in this case stems from an automobile accident in which Amy Grimm rear ended Kelly and Eric Eschbachs' vehicle. Grimm was insured by GEICO Insurance Company and tendered her defense to her insurer that then assigned counsel to represent her. The case was transferred to the King County Superior Court mandatory arbitration department. The arbitration hearing was held on December 19, 2008. On December 23, 2008, Kelly and

Eric Eschbach received an award for $35,043.64 and $500.00, respectively. Grimm filed a request for a trial de novo on January 7, 2009, pursuant to MAR 7.1 and LMAR 7.1.[1] On that same date, Grimm made a request for a jury trial. The trial court issued an order setting the trial date for April 27, 2009.

On February 18, 2009, Grimm was deposed by the Eschbachs' counsel. In her deposition, Grimm responded to questions posed by the Eschbachs' counsel:

> Q. Showing you what's been marked as Exhibit Number 3, this was a pleading filed by your attorney. It's called a request for trial de novo, which is another way of saying that you have appealed the decision by the arbitrator. Were you made aware of that?
> A. Yes
> Q. And did they do that with your consent?
> Mr. Crowley: Objection; calls for attorney-client privileged discussions. I'm going to direct you not to respond to that.
> THE WITNESS: Okay.
> Q. What I want to know is: Did you consent? I'm not asking for any conversation that you had with any attorneys.
> As we sit here today, was this appeal filed with your consent?
> A. I won't respond to that question.
> Do you want me to? What am I supposed to say?
> Mr. Crowley: We can probably get you a response, if you'll give me a second.
> Mr. Davis: No, I want it now, without a conference at this point. If you're going to stand on your objection, fine. I'm not asking for anything that's protected by attorney-client privilege. I'm simply asking her today, regardless of input from others, whether this appeal was filed with her permission and consent.
> Mr. Crowley: Okay.
> Mr. Davis: So you can decide whether you're going to allow her to answer the question or not.
> Mr. Crowley: And you would prefer that I not speak with her about that issue?
> Mr. Davis: No. It was a question pending, and I want an answer.
> Mr. Crowley: Okay.
> Go ahead and respond.

[1] MAR 1.1.

A. No.

After a discussion off the record, the deposition was concluded.

The Eschbachs moved to dismiss the action because Grimm's attorney did not have authority from his client to pursue the appeal to superior court for a trial de novo. Grimm's attorney objected and submitted an affidavit from Grimm in which she explains her testimony at the deposition. After argument, the trial court struck the request for the trial de novo and entered judgment on the mandatory arbitration award. Grimm appeals.

ANALYSIS

Grimm assigns error to the trial court's order striking her motion for trial de novo. The Mandatory Arbitration Rules (MAR) apply to mandatory arbitration of civil actions under chapter 7.06 RCW.[2] Interpreting MAR is a matter of law which is reviewed de novo.[3] MAR 7.1(a) governs requests for trial de novo and reads in pertinent part:

> Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

Grimm requested a trial de novo within that time frame and the court set a trial date. The Eschbachs argue that because Grimm's attorney did not have her authorization to request a trial de novo, there is no aggrieved party, and that without an aggrieved party, no action can be maintained. The Eschbachs argue

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[2] MAR 1.1.

[3] Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997); Vanderpol v. Schotzko, 136 Wn. App. 504, 150 P.3d 120 (2007).

that Grimm's responses during deposition were clear and that her subsequent affidavit explaining those answers cannot be considered. We disagree.

In the case of motions for summary judgment, a genuine issue of material fact cannot be created by an affidavit that apparently contradicts or conflicts with the nonmovant's earlier deposition testimony. The rule is set forth in Duckworth v. Langland:[4]

> "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony."

But the inquiry does not end there. As noted by the Duckworth court, even though a declaration can be "arguably inconsistent" with verified pleadings, it does not necessarily lead to the conclusion that such statements are contradictory.[5] Because Duckworth involved a summary judgment motion, the court accepted Duckworth's characterization of the agreement. Here, Grimm's later declaration asserts that she authorized her attorney to pursue the matter further. Grimm's affidavit explains that "[p]rior to the filing of, what I now know to be a 'request for trial de novo,' I consulted with my attorney; we discussed the pros and cons and ultimately decided to proceed with a jury trial." Her affidavit further states that she sought clarification of what was meant by the original question in the deposition and that she was not afforded an opportunity to confer with her counsel before answering. This affidavit is not a clear contradiction of

[4] 95 Wn. App. 1, 988 P.2d 967 (1998) (quoting Marshall v. AC&S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)) (emphasis added).
[5] 95 Wn. App. at 8.

her earlier testimony, but rather an explanation of it.

Similarly, in Safeco Insurance Company v. McGrath,[6] the court found that a previous affidavit in which the defendant pleaded guilty to second degree assault did not contradict subsequent testimony during which the defendant denied any intent to shoot the victim. The injured parties brought a successful negligence action against McGrath. Safeco, McGrath's insurer, brought a declaratory action, claiming McGrath's actions were intentional and therefore excluded from coverage.[7] Safeco argued that McGrath's affidavit in his guilty plea was a clear contradiction of his subsequent testimony. The court disagreed; noting that in order for the policy's exclusion to apply the insured must intend both the physical act of pulling the trigger and the resulting injury.[8] Inasmuch as the subjective intent of the insured was at issue, the court noted:

> Even assuming that the affidavit standing alone would require a finding of intent to injure, we must consider it in light of McGrath's subsequent sworn testimony which is certainly not in flat contradiction thereto. Furthermore, McGrath's subsequent testimony offers an explanation of one of the principal affidavit statements relied upon by [the insurer.][9]

Likewise, here, it is Grimm's subjective intent that is at issue, leading one to the inevitable conclusion that the later affidavit is an explanation of why Grimm initially responded the way she did.

The parties have argued this case to us largely on the assumption that the summary judgment standard is what should be applied in this circumstance.

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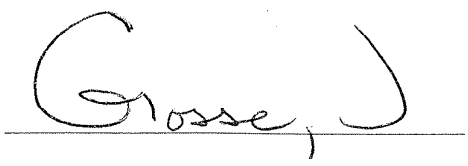
[6] 63 Wn. App. 170, 172-75, 817 P.2d 861 (1991).
[7] Safeco Ins., 63 Wn. App. at 172.
[8] Safeco Ins., 63 Wn. App. at 175.
[9] Safeco Ins., 63 Wn. App. at 175.

Because applying the proper test to that standard results in a reversal of the trial court's action striking the request for a trial de novo and for a jury, we need not go further in our analysis. However, we must note that the circumstance presented by this motion to strike is not the same as that of summary judgment.

While the motion to strike may require that the trial court conduct a factual inquiry, the subject matter of that hearing is not whether there is a factual dispute, but rather, whether the moving party has waived his or her right to a jury trial, quite a different inquiry. Equally as important a question, and one on which we do not have briefing and argument, is just what right opposing counsel has to raise this issue, to say nothing of what an answer to the question of who is the "real party in interest" might entail in the context of automobile insurance contracts. Can a party who has suffered an adverse judgment for which the insurer is obligated categorically refuse to cooperate with the insurer should it believe an appeal justified? How does the answer to that question change if there is a possibility of a judgment exceeding coverage? In short, just who is the real party in interest? These questions may have easy answers, but we have no briefing and argument on them, nor were they raised below.

We reverse and remand for the trial court to reinstate the request for trial de novo and jury trial.



WE CONCUR:

Schindler, CJ

Cox, J.